FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF

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Government concedes search and seizure was not based upon a proper or valid search warrant but seeks to justify search and seizure under contract.

II

Such searches and seizures are not proper; contract is governed by statutes and permits only administrative inspection by the Navy Department and requires utmost secrecy. It was conceded F.B.I. not authorized to inspect under contract.

III

Both searches and seizures for evidences of a crime are forbidden by Fourth Amendment to the Constitution of the United States.

IV

Fifth Amendment forbids use in evidence of books and records secured by such searches and seizures.

V

Title 18, Section 612(2) U. S. C. A. requires valid search warrant for securing any instrumentalities used as the means of committing a crime and it is inherent therein that any other searches and seizures are forbidden.

VI

Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643(a)) provides for complete immunity guaranteed by Fifth Amendment to Constitution for any documentary evidence produced under compulsion showing that Congress intended to preserve all rights to defense contractors under Fifth Amendment against any use of their books or papers against them by granting immunity for their production.

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There was never any contention of consent by the Government other than that of inspection through authority of the contract. Consent could not be granted in this case by an employee, and in fact was not granted, even if it could be. The Statute does not permit consent to be granted to anyone except authorized agencies.

VIII

The right to claim the privilege of the Fifth Amendment being personal, even in the absence of Statute, consent to the waiver of a constitutional right is also personal to the accused and should not be deemed given unless the record shows such consent clearly and understandingly given.

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The Government has conceded that the search and seizure of the petitioner's documents, books and records, Exhibits 5, 32, 34 to 45, 52, of December 1, 1942, were based upon a search warrant which was invalid because the affidavit in support thereof failed to set forth reasonable and probable cause as required by the Fourth Amendment and by Sections 613 to 616, Title 18, U. S. Code.

The essential requirements of a search warrant are that it must be based upon an affidavit setting forth facts showing reasonable and probable cause and upon facts that would be sufficient to satisfy a jury that there were grounds for believing that an offense had been committed. It is conceded that the search warrant and affidavit in support

thereof of December 1, 1942, failed to conform to these requirements.

See

Grau v. *United States*, 287 U. S. 124;
Nathanson v. *United States*, 290 U. S. 41;

In the trial court below it was claimed that the search and seizure were pursuant to the search warrant (R. 169, 171, 173). It was conceded by the language of the return to the search warrant that there was a search and seizure December 1, 1942, and that it was made pursuant to the search warrant (R. 176).

However, the Government has conceded that reliances based upon the search warrant for its search and seizure and the subsequent use in evidence of the documents cannot be sustained upon the invalid search warrant. And, although the taking was pursuant to the search and seizure upon an illegal warrant it now says it doesn't make any difference. It could take the papers and use them against the accused. It now seeks to justify its position upon the following untenable propositions:[1]

(1) That the contract of the petitioner authorized inspection by authorized agents of the government and that therefore it was proper for the F. B. I. to inspect the documents, books and records.

(2) That if upon their inspection, they came upon evidence of a crime, or if they upon their own views decided they were "instrumentalities of a crime" that they then had a right to seize the documents and carry them off without a search warrant; and

(3) Thereafter introduce them in evidence in the trial against the petitioner.

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[1] In *U. S.* v. *Bosoni*, 57 F. (2d) 328, the court said that the government cannot rely upon a different ground than acted upon by the trial court.

In this respect the F. B. I. neither by the terms of the contract nor by statute had authority to inspect the contractor's books, plant or records.

In respect to the terms of the contract, the language of the contract in relation to the word surrounding it shows that it was meant solely for the administrative purposes for which it was designed, namely, to permit administrative inspection of the accounts and adjustments in aid of administrative work within the Navy itself.

On page 7 of the contract, the provisions of the contract upon which the respondent relies reads as follows:

> "For the purpose of determining the cost to the contractor of furnishing and delivering said supplies or services, the rules prescribed by Treasury Decision No. T. D. 5000 approved by the Secretary of the Treasury July 29, 1940, and by the Secretary of the Navy on August 6, 1940. The accounts and records of the contractor shall be open at all times to the Government and its representatives and such statements and returns relative to costs shall be made as may be directed by the Government. All information obtained from the contractor's accounts and records shall be treated as confidential."

The word "confidential" is defined in the Order of Franklin D. Roosevelt, as President of the United States, under Ex. Order No. 8381, 5 Fed. Reg. 1147, D. I. (Title 50, Section 45, 1945 Cum. Annual Pocket Part), as vital military and naval installations and equipment requiring protection against the general dissemination of information relative thereto and providing for fine and punishment for disclosing any matters classified or designated or marked as *confidential*, or secret or restricted by the Secretary of the Navy.

The Second War Powers Act further forbids, in Title 50, IV, Section 643 and Ex. Order 9127 pursuant thereto, any

person from inspecting the plants and auditing books of defense contractors except those agencies designated in the Act and Executive Order. These went into effect prior to the date of the return of this indictment and prior to the search and seizure of December 1, 1942. These measures of national security must be held to govern all contracts which they affect.

It was conceded by the Government in the oral argument that the F. B. I. was not one of the agencies designated by Executive Order 9127 (Title 50, App. Sec. 643, U. S. C. A., War Appendix, pages 269, 270, 271), that the Executive Order permits only persons in "the respective departments or agencies" to make any delegations of their powers and authority "within their respective departments and agencies." Therefore the F. B. I. derived no authority from the contract.

Therefore Hilton Byars, a civilian cost inspector in the Navy, had no right or power to permit any inspection of the books, records, and documents which were introduced against the petitioner. The government has not differentiated the inspection by authorized personnel employed either as civilian Navy personnel or military Navy personnel and under complete jurisdiction of the Navy with unauthorized inspection by members of the F. B. I. who possessed no authority either by statute or otherwise to make the inspection in question. Orderly administrative and military necessity command that this be so. The President had authority to include the F. B. I. but he didn't.

Passing therefore from the question of unlawful search by the F. B. I. on the unauthorized permission of a civilian auditor of the Navy, we come to the question of unlawful seizure. There is nothing in the statute or in the contract that permits the seizure of books, papers, documents and records, or their use in evidence in a criminal case. Here

the defendant had been arrested on November 5, 1942, and had been indicted on November 25, 1942, and again taken into custody on that date (R. 147). The seizure therefore of December 1, 1942, was not an incident to a lawful arrest nor were there any instrumentalities of the crime taken incidental to a lawful arrest.

It was never claimed by the Government in the Trial Court that any of these documents, including Government's Exhibit 7, were the *instrumentalities* of any crime. The documents are listed on pages 176 and 177 and are more fully described in the Prosecutor's own affidavit on pages 198 to 201 of the record, but Exhibits 5 and 52 were included in the general classification on the motion to suppress the evidence. All of them as pointed out by Justice Frankfurter are in themselves unoffending papers.

U. S. v. *Lefkowitz*, 285 U. S. 452, 467.

Exhibit 5 is a receipt for $300 from McAvoy (R. 302).

The cancelled checks described on page 200 of the record are cancelled checks of Edward F. Zap, Aeronautical Engineers and Edward F. Zap, 9 packages, March to November, 1942. "They were and are cancelled checks returned by the Bank to Edward F. Zap and all kept in the regular course of business." Their seizure at the time they were taken on Decembere 1, and under the circumstances as shown by their subsequent attempt to introduce them in evidence was merely for the purpose of securing evidence in proof of an alleged crime which according to the indictment, had occurred October 16 and September 13 and for which the petitioner had been indicted six days before. It was an exploratory search to secure evidence which has always been forbidden by the Fourth and Fifth Amendments.

Count IV relates solely to a claim against the government and the books and records are nowise other than evidence.

The indictment alleges that the offense defined in Count V was committed *in the following manner and by the following means:* (R. 10). It then alleges use of the check, Govt's Exhibit 7.

But this is exactly what the search warrant sections of Title 18 mean when it says that a *valid* search warrant may issue for the seizure of any property:

> "2. When the property was used *as the means of committing a felony;*" Title 18, Section 612, Sub. 2.

To hold as the government contends that unoffending papers, alleged in the indictment as the manner of means, could be seized without a valid search warrant, or if seized on an invalid search warrant, could nevertheless be used in evidence would be to emasculate the requirements of Title 18, Sections 611 to 633 and the Fourth and Fifth Amendments to the Constitution of the United States.

Go-Bart Importing Co. v. *United States,* 282 U. S. 374, 75 L. Ed. 344, said, approving:

> "• • • Gouled v. United States, 256 U. S. 298, 307, 65 L. Ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. Ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective

enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. Ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. Ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

The search and seizure thus six days after the return of the indictment could therefore only be a quest for evidence of an alleged offense committed on or about October 16 and September 23 and for which the indictment had been returned November 25.

Let it be kept in mind that there is no such thing known to Anglo-American law as a valid search, at any time, or at any place, or under any circumstances for papers to be used as evidence against an accused. Even a search warrant, issued with all formalities of law, will not avail for that purpose.

In *Entick* v. *Carrington*, 19 Howard St., Tr. 1029, the court said:

> "But our law has provided no paper search in these cases to help forward the conviction * * *."

This is quoted with approval in *Boyd* v. *U. S.*, 116 U. S. 616, 629.

And in *U. S.* v. *Lefkowitz*, 285 U. S. 452, the court defined the things that may not be taken, Justice Frankfurter reading the section in the oral argument.

See also:

Gouled v. *United States*, 255 U. S. 298;
Boyd v. *United States*, 116 U. S. 616;
U. S. v. *Lefkowitz*, 285 U. S. 452.

Government's Exhibit 7 was a check innocent of itself and could only be of value as evidence, and comes within the purview of the Fourth and Fifth Amendments.

It would enable the seizure of any books, papers and records and circumvention of the Fourth and Fifth Amendments by alleging their use as the manner or means of the commission of the alleged offense. Thus any book, paper or record innocent of itself would thereafter become the instrumentality of a crime.

It was never contended in the hearings on the Motions to Suppress the Evidence that Government's Exhibit 7 was an instrumentality of a crime nor does the record as finally presented in this entire case show that it ever was the instrumentality of a crime.[2]

Books and Records Lawfully Kept

As to the books and records lawfully kept in pursuance to the contract, it was never heretofore contended in the Trial Court below that these were instrumentalities of crime but rather that they were evidence which it was necessary for the bookkeeper and auditor to consider and for evidence to be introduced in Court in the trial of this action.

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[2] If the court goes beyond the contentions in the trial court on the motions to suppress the evidence and the affidavits pro and con and the court's ruling and examines the entire record it will see that it was never used as an instrumentality of crime. The gravamen of the charge of count V is that the check was presented to Byars. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byars), in support of said *statement*. Byars did not so testify. Zap denied it. If there is any such evidence in the record we have failed to find it anywhere in the testimony of Hilton Byars who would be the person who would have to testify to that fact.

Zap testified that the flight test and insurance took between $4,587.64 to $4,787.64 either spent or incurred (R. 613). This was not denied by the government.

Zap further testified he never made any statement or representation to Hilton Byars. He never asked or said anything to Hilton Byars (R. 615). This is undenied by Byars.

The check itself was an unoffending paper such as those described in the Lefkowitz case.

Respondent's papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.

Gouled v. *U. S.*, 255 U. S. 298;
U. S. v. *Lefkowitz*, 285 U. S. 452;
Takahashi v. *U. S.*, 143 F. (2) 118.

The Government says that there was a prior inspection of the F. B. I. made pursuant to the contract. This is erroneous.

The contract provides that:

> "The contractor obligates himself to set up a separate record of costs against this contract for subsequent consideration and inspection by authorized representatives of the Navy Department (Bureau of Supplies and Accounts)" (Govt. Exhibit 3, page 7).

Furthermore the contract provides for the greatest secrecy and penalizes the contractor even to the extent of forfeiture of his contract for failure to maintain such secrecy, and opens him to criminal prosecution if secrecy is not maintained. Contract, pages 8 and 12.

The Contract must be read in the light of the statutory provisions. Section 3101 of Title 10, U. S. Code, as amended by the Second War Powers Act and Executive Order 9127.

Both of these provisions provide for Administrative Inspection by a particular department of the Navy pursuant to the statutory provisions. All others, by the terms of the statute and executive orders are forbidden. And the Statute itself (Section 1301 of the Second War Powers Act (Title 50, Supp. IV, Section 643a) provides for the guarantee of

the Fifth Amendment by providing for complete immunity upon claiming the privilege for any document or thing required to be produced pursuant to the administrative order. This shows clear congressional intent to safeguard contractors rights under the Fourth and Fifth Amendments.

Wigmore (3rd Edition, 1940), Section 2377, says:

> "• • • many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the Government. An attempt to do so by mere compulsion might be tedious and ineffective. And where the ultimate purpose is administrative, and not penal, it may well be that the Government can afford to promise secrecy in respect to purposes penal or litigious as the price of readily achieving its administrative purpose when it demands a report of the truth. It is some such principle that justifies the modern creation of a number of privileges, all statutory in origin, carrying sundry matters required by law to be reported to some *administrative* official."

Congress by statute gave defense contractor's books and records privacy, secrecy and provided for statutory immunity pursuant to the guarantees of the Fifth Amendment, if produced.

Title 50, Section 643 a U. S. Code.

Element of Consent

During the oral argument the question was raised before this Court of whether there had at any time been any consent on the part of Zap to the inspection by an agent.

There never has been any contention on the part of the Government in this case that the defendant consented to the *search* and *seizure* of his books and records or their use in evidence against him. The Government has contended only that by the terms of his contract was there

an authority to inspect and from that claimed authority to inspect, they have expanded the claim to include (1) search, (2) seizure (forbidden by the Fourth Amendment), and (3) the use in evidence of the books and records so searched and seized (forbidden by the Fifth Amendment).

Boyd v. *U. S.*, 116 U. S. 616.

In the Trial Court, the petitioner expressly set out in his affidavit that he at no time consented to the searching or seizing of his books and records and that he did not authorize anyone to take any books, papers, records and documents from the said business and that at no time did he consent to the taking of said books, papers, records and documents and did not know of the taking of the books, papers, records and documents (R. 136, 137). That was undenied by the Government.

No claim of consent by employees was advanced there.

It also appears that various cost inspectors of the Navy protested to the F. B. I. agents that they had no authority to examine the books and records which were the confidential property of Edward F. Zap Aeronautical Engineer (R. 150, 158).

There never was any contention that Zap consented directly or indirectly to the taking of Exhibit 7 and he moved to suppress it in advance of trial and strike it during the trial on the grounds that it violated his constitutional rights under the Fourth and Fifth Amendments to the Constitution (R. 127, 132, 369, 370, 378). In none of the affidavits did the Government claim consent through employees.

There are various reasons why under no circumstances could there have been consent in this case.

(1) Since the contractor was governed by the express provisions of Title XIII of the Second War Powers Act

(50 U. S. C. App., Supp. IV, 643 and 643(a) and by Executive Orders 9127 and 8381, it was impossible for consent lawfully to be given the F. B. I. either by the contractor or his employees without directly violating the Statutes and Executive Orders and express terms of the contract relating to the persons who might be authorized to see his books and records and inspect the same and take them.

(2) Nor do we understand the law to be that even if there could be consent and waiver of a constitutional right that it could be made by anyone but the accused himself in a criminal case and upon a clear and convincing showing. This has been the rule in cases of waivers of consent of other constitutional rights such as the right of counsel (Sixth Amendment), the right to trial by a full jury (Seventh Amendment) and other fundamental and important constitutional rights.

The right of a person to refuse to incriminate himself is purely a personal privilege of the witness.

U. S. v. *White*, 322 U. S. 694;

If it is personal to the accused to claim it, it would appear that it must be personal to the accused to waive it.

And in any event proof of waiver must be clear, convincing, and certain, equal with waiver of right of counsel, or of one juror.

U. S. v. *White*, 322 U. S. 694;
Patton v. *U. S.*, 281 U. S. 276;
Powell v. *Alabama*, 287 U. S. 45;
Walker v. *Johnson*, 312 U. S. 275;
Dorsey v. *Gill*, 148 F. (2) 857.

Only where the accused competently and intelligently waives his right of counsel "with his eyes wide open" has he waived the constitutional right.

Walker v. *Johnson*, 312 U. S. 275.

It would seem that the Constitution afforded the same guarantees under the Fourth and Fifth Amendments and waivers should not be assumed or implied.

We have never understood that these important fundamental and constitutional rights could be waived in absentia by a clerk, a bookkeeper, a secretary or even an office manager. But if they could be, there was none in this case. The Government never contended in the Trial Court on the Motions to Suppress Evidence that there ever was consent through any manager or any other person.

In *Amos* v. *The United States*, 255 U. S. 313, 317, the Supreme Court said:

> "The contentions that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here present, no such waiver was intended or effected."

(3) During the oral argument, there was a question raised about whether Stuart Eldridge Weaver, Jr., a young man and a comparatively new employee, having been employed on September 25, 1942, and remained so employed until November 6, 1942 (R. 397), had given any consent to an inspection by the F. B. I. This question was not before the trial court on the motion to suppress the evidence and was not offered by the Government. We do not think the Court should therefore consider it. But we meet the point in any event.

Assuming that Weaver could, by violating the statutory provisions above quoted, give authority to F. B. I. agents to come into the plant, the record does not bear out any

such state of affairs. Only a portion of the record in respect to him was read to the Court in the oral argument. A reexamination of the record shows that this argument proceeded upon erroneous assumptions of the record.

It appears from the record that after Zap left, Champlin was endeavoring to get Weaver and other employees inducted into the Military Service so that he might have a free hand. Champlin had been contact man with the draft board (R. 616). A particular sentence quoted to this Court in oral argument actually related to that matter. We give the testimony herewith (R. 400):

"By Mr. Lavine:

Q. Did Mr. Champlin and you have some difficulties over your draft status?

A. Slight difficulties, yes.

Q. Just state what occurred.

A. At my request, Mr. Champlin, shortly after Mr. Zap left, started to bring into the office the agents or representatives of the Government. Mr. Champlin made statements to me which I wanted to find out the truth of, which were derogatory to various employees, and derogatory to Mr. Zap.

Q. Did Mr. Champlin try to get you inducted into the service so you would no longer be manager of the Zap organization, after Mr. Zap installed you?

(Objection by the Government sustained)" (R. 400).

It will be seen from the above that the questions related to the draft status of Weaver and the record does not show what agents, whether they were persons connected with military draft matters or of the Navy Department or who they were. Certainly this evidence cannot be considered as a waiver by Zap through an agent of anything, much less of his right to be searched and his papers seized and used in evidence against him.

But Zap immediately upon his return November 6, 1942, notified the F. B. I. that they had no right to make searches and seizures in his plant and they told him to go home and have a Scotch and soda and continued under the authority of their position to do as they saw fit. The books and records and the papers which are objected to in this case were searched and seized December 1, long subsequent to the time (November 6, R. 397) that Weaver left the plant.

But if we, for the sake of argument, were to concede that Weaver or anyone else might permit persons to come into the plant, we still would be faced with their right to seize papers and take them away and thereafter use in evidence against the accused without any process. The authority to inspect, even if it exists, does not include the authority to search and seize as guaranteed by the Fourth Amendment and to use such evidence against a person as guaranteed by the Fifth Amendment.

Boyd v. *United States*, 116 U. S. 616;
Takahashi v. *United States*, 143 F. 2d, 118.
People v. *Richter* (New York), 265 App. Div. 767.

In the *Takahashi* case, the Statute permitted searches of persons at Immigration stations. Officers seized some papers from a Japanese and the Court there held that the authority to search did not grant the authority to seize papers and thereafter use them in evidence against the accused.

In this case, Zap not only promptly expressed his disapproval of any searches and seizures in his plant but objected in advance of trial to the use in evidence of these documents so searched and seized and carried away.

The record further discloses that Champlin, the faithless employee, had entered into a conspiracy with other employees to gain control of Zap's business. Zap left for Washington on October 18, 1942 (R. 138). Just after he

left, Mr. Champlin, in conspiracy with other employees, planned to gain control of Zap's plant and organization. Champlin conferred with other employees every day in the private office (R. 472). "Mr. Champlin told me, during the absence of Mr. Zap, that he intended to become the head of the Zap organization. He told me that was one of his aspirations." And Mr. Champlin told me "that he intended to become president of the Zap organization, the head of it." Testimony of Ethel Boyle (R. 473).

On October 27, Champlin was a party to a telephone call to Washington to see what arrangements could be made to take over the business of Mr. Zap (R. 501). He okayed the payment of a bill for this telephone call. He at no time notified Mr. Zap that he was about to be arrested. He also told various employees in the office that Mr. Zap was going to be arrested (R. 499), and he took a trip to San Diego to see the Navy Captain in Charge in San Diego (R. 500). Champlin told Miss Boyle he was going to send Zap to prison for 167 years (R. 553) and that he was going to be in charge of the Zap concern (R. 554). Champlin was controller in charge of books and particularly Government's Exhibits 34 to 45, which were later introduced in evidence (R. 481). Ethel Boyle, the bookkeeper, took orders from Champlin (R. 535).

On October 31, Champlin made an affidavit for a search warrant on behalf of the F. B. I. This affidavit was made on October 31, 1942 (R. 187-189). While this affidavit was on information and belief and faulty in many other respects the search under it was not used in evidence here. We mention the matter only to point out that Champlin on October 31 was already working with F. B. I. agents who were on notice of that fact.

Ordinarily, if there had been a mistake discovered by Navy personnel of a comparatively minor nature involving

whether the bill was $4,000 or whether $4,000 included the insurance and many items of expense (R. 305, 591) which had been incurred and which was contained in the estimate to the Navy for "flight test and insurance," would have been a matter for readjustment in the usual course of Navy procedure. The claim, made out October 16, 1942, probably had not even time to reach the Navy when the F. B. I agents came in "on their own responsibility."

The Navy, under its regulations, withheld from the contractor at all times at least a substantial percentage of the amount due him. Therefore, such a petty error, if one occurred, would have been a simple matter to have asked him about and readjusted. As a matter of fact, the contractor himself stated that between $4,587.64 and $4,787.64 had been incurred in the flight test and insurance which is considered a part of the flight test (R. 613) and this was undenied, but through Champlin and the F. B. I. agents working on this particular case, all this was prevented and through the unauthorized seizure of the documents here, the matter was rushed to a criminal trial.

The books and records, Exhibits 34 to 45, were used in an effort to show that this amount had not yet been paid out for the insurance and as part of flight test expense (although it was incurred), and the books and records were sent to the Jury Room when the Jury retired (R. 719). Thus, these books and records unlawfully searched and seized were important evidence used against the petitioner.

Conclusion

In this case we have an important figure in the Aviation world through whose private office and private safe F. B. I. agents went indiscriminately in quest of evidence and to build a case if they could by illegal search and seizure and there after these books and records were all introduced in

evidence against the defendant over timely motions to suppress the evidence and other objections.

It is respectfully submitted that as fundamental rights under the Fourth and Fifth Amendments were violated in the use in evidence of these books, records and papers searched and seized without any lawful search warrant, that in accordance with the well known doctrines established by this Court in enforcing the Constitutional mandates of the Fourth and Fifth Amendments, that the judgments should be reversed and that the evidence unlawfully searched and seized should be ordered suppressed in evidence and ordered returned to the defendant.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

NOTE: Many of the books and records included within Exhibits 34 to 45 are still with the office of the Clerk in Los Angeles, should the Court desire to see them. It was stipulated that they could be sent in original form to this court and if the Court should desire to see other than the description set forth, the Clerk will no doubt forward them to the Court (R. 91 to 94).

APPENDIX

The following statutes and executive orders supplement the appellant's appendix in the opening brief.

Title XIII, Second War Powers Act

643(a). Oaths and affirmations; attendance and testimony of witnesses; production of records and other evidence; unlawful disclosure of information obtained.

For the purpose of obtaining any information or making any inspection pursuant to Section 1301, any agency acting hereunder, or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpoena otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be demed relevant to the inquiry. Such atendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory or other place subject to the jurisdiction of the United States: *Provided*, that the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpoena issued with respect thereto, such person furnishes such agency or the Chairman of the War Production Board, as the case may be, with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with such agency or the Chairman of the War Production Board, as the case may be, as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees in mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in

obedience to any such subpoena, or in action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. Such agency or the Chairman of the War Production Board shall not publish or disclose any information obtained under this title which such agency or the Chairman of the War Production Board deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless such agency or the chairman of the War Production Board determines that the withholding thereof is contrary to the interests of the National Defense and Security; and anyone violating this provision shall be guilty of a felony, and upon conviction thereof, shall be guilty of a felony, and upon conviction thereof ceeding two years, or both. March 27, 1942, 3 P. M., E. W. T., C. 199, Title XIII, Section 1302, 56 Stat. 185.

Executive Order No. 8381 (5 F. R. 1147)

Whereas, Section 1 of the Act of January 12, 1938, 52 Stat. 3, Title 50, Section 45 provides: • • •

Now therefore, by virtue of the authority vested in me by the foregoing statutory provisions, and in effectuation of the purposes of the said Act of January 12, 1939, I hereby define the following as vital military and naval installations or equipment requiring protection against the general dissemination of information relative thereto.

1. All military or naval installations and equipment which are now classified, designated and marked, under the authority or at the direction of the Secretary of War or the Secretary of the Navy as "secret," "confidential,"

or "restricted," and all military or naval installations and equipment which may hereafter be so classified, designated, and marked with the approval or at the direction of the President and located within * * *

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(f). Any commercial establishment engaged in the development or manufacture of military or naval arms, munitions, equipment, engines, ships or vessels for the United States Army or Navy; all military or naval aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment, whatsoever, in the possession of the Army or Navy, or in the course of the experimentation, development, manufacture, or delivery for the Army or Navy which are now classified, designated and marked under the authority or at the direction of the Secretary of the War or the Secretary of the Navy as "secret," "confidential," or "restricted," and all such articles, materials or equipment which may hereafter be so classified, designated and marked with the approval or at the direction of the President.

3. All official military or naval books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts and specifications, which are now marked under the authority or at the direction of the Secretary of War or the Secretary of the Navy as "secret," "confidential," or "restricted" and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President.

FRANKLIN D. ROOSEVELT.